

REMARKS

Claim 1-5 and 19-21 are currently in the application. Claim 1 has been amended by the present response. Claims 2-5 and 19-21 remain unchanged from the Claims submitted with Applicants's Preliminary Amendment submitted with a Request for Continued Examination (RCE) filed February 26, 2008.

All the Claims in the application are under final rejection following the first action of the Examiner to Applicant's RCE.

It is believed that the present amendment to Claim 1 places Claims 1-5 and 19-21 in condition for allowance.

Reconsideration of the final rejection and allowance of Claims 1-5 and 19-21, in view of the amendment to Claim 1 and the discussion submitted herein is respectfully requested. In any event, entry of the amendments to Claim 1 and the discussion submitted herein is requested for purposes of Appeal.

Claim 1 of the present application has been amended to more definitively set forth that applicant's claimed invention is directed to a fitment which is fitted into a preexisting opening defined in, and extending through the thickness of, the top wall of a container.

Features of the claimed invention include:

(a) The claimed fitment may be mounted in the preexisting opening from either inside or outside of the carton and provides a conduit through which contents of the container may flow out of the container.

(b) the conduit defined by the claimed fitment has a generally ellipsoidal cross section thereby defining a minor section and a major section which provide advantages with respect to even flow of contents which are being discharged from the container, among other advantages.

(c) within the conduit of the claimed fitment there is provided a tear away membrane having its perimeter releasably (tearably) joined to the inner wall of the conduit defined by the fitment,

(d) the location of the tear away membrane of the fitment set forth in amended Claim 1 is fully within the conduit defined by the fitment and spaced apart from the opening in the top wall of the container.

Claims 1-5 stand rejected under 35 USC § 102(b) as being anticipated by US 5,875,958 to Weiteder et al.

The Examiner's Rejection

In the final rejection of Claims 1-5, the Examiner states:

“Weiteder shows a fitment attached to a perimeter of opening 10 on top wall 1A of container 1, seen in Fig. 1, having a flange with a upstanding walls 3 and 12 (sic) forming a pour conduit with a substantially ellipsoidal planar cross section with a minor portion above a major portion, see Figs, 3B and 4, a tier (sic) away membrane 7 at the minor portion and **including a pull ring 8 disposed at a location spaced apart from the top wall, see Figs. 5 and 6, a hinged cap 5 integrally formed with the conduit and having an annular projection 9 with the same geometrical shape of the**

conduit. Ambient air ingresses into the container through the minor portion of the conduit as product is poured from the container.”(emphasis added).

It is respectfully noted that whereas both Applicant’s fitment and the fitment disclosed by Weiteder employ a “pull ring”, it is not the location of the pull ring which is relied upon to differentiate Applicant’s claimed fitment from the fitment of Weiteder.

Rather, among the differentiating features of Applicant’s fitment versus the Weiteder fitment reside in the structure for and mode of (a) developing a conduit through which the contents of the container may be discharged and (b) the development, structure and location of a means whereby the conduit may be closed to capture the contents within the container and, when it is desired to discharge the contents, the conduit may be opened to permit outflow of the contents.

Importantly, it is to be noted that the Examiner, in the rejection of Claims 1-5 under 35 USC §102(b) as being anticipated by Weiteder, refers to “... a tier (sic) away membrane 7 at the minor portion and including a pull ring 8 disposed at a location spaced apart from the top wall, see Figs. 5 and 6 ...

Again, Applicant has not argued that the location of a pull ring is the distinguishing feature of Applicant’s claimed invention as relates to Weiteder. Rather, it is respectfully suggested that neither Fig. 3B nor Fig. 6 of Weiteder shows a “tear away membrane” as a feature distinct from, and separated from, the top wall of the Weiteder package.. Neither does the numeral 7 identify a tear away membrane. Rather, the numeral 7 does not appear in Fig. 3 B and rightly so, because the numeral 7 refers to the “base plate” of an “opening aid”6 (See col.3, lines 58 et seq. where it is stated:

"An opening aid 6 is applied in accordance with the invention on the package gable in the interior of the opening area 5, as is shown in particular in FIG. 4, in the represented and thus preferable embodiment the opening aid 6 is provided with a base plate 7 and a handle means 8 provided on the base plate 7 for lifting the same. In the preferred embodiment, of the invention the handle means 8 is arranged as a ring strap."

Further, contrary to the Examiner's observation that the Weiteder fitment includes a "pull ring 8", the numeral "8" is employed in Weiteder to identify the "handle means of a ring strap".

Whereas the foregoing observations may appear to be of minor importance, they are most pertinent with respect to whether Weiteder anticipates Applicant's claimed invention. For example, the Examiner further notes that Applicant's earlier "arguments" are not considered persuasive in that

(a) "applicant's argument that the references fail to show a tear away membrane located spaced a part from the associated container wall, it is noted that the applicant makes reference to the pull ring in his arguments to indicate that the tear away wall concept disclosed by Weiteder is not spaced apart from the container wall; However, the device of Weiteder clearly shows, in Figs. 2, 3A and 6, that the tear away membrane 7 is offset from (sic) the container wall 1A in a direction towards the interior of the container. The entire tear away wall is offset from the container top wall not just the pull ring 8".

At the outset, it is to be noted that in Weiteder the opening aid is physically attached to the top wall of the container so that upon actuation of the opening function of the Weiteder container, the opening aid tears away a defined portion of the top

wall itself, NOT a membrane disposed in spaced apart relationship with the top wall of the container.

In this respect, it is not understood what the Examiner is asserting by the statement that: "The entire tear away wall is offset from the container top wall not just the pull ring". As noted, the "tear away" of Weiteder IS part and partial of the top wall, not a separate membrane which is "spaced apart from the top wall" as claimed by Applicant.

Weiteder discloses that their top wall comprises a plurality of layers, namely: a composite having at least one carrier layer made from paper or cardboard, a coupling layer, an oxygen barrier layer preferably made from aluminum, and a double-sided plastic coating made from polyethylene (PE) with an opening area provided in the package gable which forms the pour opening after the severing.

Weiteder further discloses that the manufacture of their container includes the steps of:

Producing the opening area in the carrier layer in the zone of the future pour opening; (Note that Weiteder distinguishes the "opening area" from the "future pour opening");

Applying the outer PE layers;

Laminating of an aluminum layer;

Applying the inner PE layers;

Corrugating the multi-layer composite;

Prefolding the package blank;

Sealing the longitudinal seam into a tube-like package envelope'

Applying the opening aid on the opening area as well as folding and sealing the package floor;

Folding and sealing the package gable after the filling of the package and Applying the pouring element provided with the closing lid on the opening area of the completed package.” (col 2, lines 7 et seq.)

Per Weiteder, “Fig. 2 shows a section of the flat gable composite Package in accordance with the invention **in the zone of an opening area arranged in the gable** in a section view along the line V-V from FIG.1:”(emphasis added).

Again, attention is called to the fact that Weiteder does not initially provide an opening in the top wall of the container, Rather, Weiteder defines an opening area (not an opening) in the top wall and affixes the fitment to the top wall in encircling relationship to the opening area. Also, Weiteder bonds an opening aid to a preselected location within the opening area.

Weiteder proceeds to list multiple embodiments as to permissible ways of weakening the perimeter of the opening area, to ensure that a pull upon the opening aid fully tears away a full thickness portion of the top wall to define an actual opening in the top wall through which the contents of the package may be discharged. In Fig. 2 embodiment, essentially all of the carrier (paperboard etc.) layer of the top wall is omitted (shown as a depression in the top wall). In another embodiment, Weiteder suggests covering the opening area with a layer of aluminum foil having its perimeter ultrasonically welded to the top wall within the opening area, but not extending beyond such area so as to not preclude bonding of the flange of the fitment to the top wall around the outside perimeter of the opening area. A still further embodiment suggested is destruction of the outer PE layer in the area of the edges of the opening area, e.g. as by laser radiation. All of these embodiments are designed to enhance the ease with which the opening aid tears away a portion of the top wall itself. There is no limitation offered by Weiteder as to where on the top wall the opening area is to be located. In Applicant's invention, an actual opening through the top wall is provided followed by attachment of Applicant's fitment about the outer margin of the opening

employing a flange and a second wall which defines a conduit through which the contents of the container may be discharged.

It is respectfully suggested that throughout the Weiterdel patent it is made clear that the opening in the Weiterder fitment includes a "to-be-torn" away portion of the top wall itself and is NOT a tear away membrane disposed across, and having its perimeter releasably joined to and closing said conduit at a location fully within said conduit defined by the second wall of Applicant's claimed fitment and spaced apart from said opening through said first wall associated with the top end of the container, as claimed by Applicant.

Notably, the opening of the conduit of Applicant's fitment produces no material impediment of the flow of contents through the conduit, once opened by tearing away the membrane. To the contrary, the tearing away of a portion of the top end of the Weiterder container is subject to incomplete extraction of the plies of the top wall and/or fragmentation of the perimetral edge of the opening produced by tearing away the multiple plies of the Weiterder container top wall and consequential uneven outflow of the contents of the container .

Claims 2-5 are each dependent from Claim 1 and therefore inherit each and every element of their parent claim and any intervening claims and therefore are not anticipated by Weiterder et al for the same reasons, among others, as set forth in the above discussion of the allowability of Claim 1.

Withdrawal of the rejection of Claims 1-5 as being anticipated by Weiterder under 35 USC §102(b) is respectfully requested.

In the rejection of Claims 19-21 under 35 USC § 103(a) as being unpatentable over Weiteder et al. in view of US 5,765,747 to Lawson, the Examiner states:

"Weiteder shows all claimed features as discussed above except for the circumferential flange affixed to the inner surface of the top wall. Lawson shows a pour fitment for a container as seen in Fig. 3, with a flange 28 designed to be affixed to the inner surface of the top wall of a container 10. It would have been obvious to a person with ordinary skill in the art to provide a more reliable scheme for retaining the pour spout fitment in place as the container is moved from the inserting station to the sealing station during manufacture as taught by Lawson."

As noted hereinabove, contrary to the Examiner's contention, Weiteder et al. do not show "all claimed features...except for the circumferential flange affixed to the inner surface of the top wall."

Among other things, Weiteder et al. do not show a tear away membrane disposed across, and having its perimeter releasably joined to and closing said conduit at a location fully within said conduit defined by said second wall and spaced apart from said opening through said first wall associated with top end of the container.

Lacking such disclosure, Weiteder fails a proper primary reference in a combination of patents relied upon as the basis for rejecting Claims 19-21 under 35 USC 103(a). Moreover, it is respectfully submitted that reliance upon Lawson as disclosing the feature of insertion of a fitment into an opening in the top wall of a container from the inside of the top wall of the carton also fails in view of the failure of Weiteder et al.

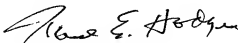
Further, Claims 19-21 each are dependent from Claim 1, either directly or indirectly, and therefore inherit each and every feature of their parent Claims and any intervening Claims. Accordingly, it is urged that Claims 19-21 are allowable for the same reasons, among others, as set forth herein above in discussing the allowability of Claim 1. Specific note is taken of the fact that Lawson fails to disclose a fitment in which "at least said exit end of said conduit having a substantially ellipsoidal planar cross-section geometry having at least one major portion and at least one minor portion", among other relative features as called for in Claim 1.

Withdrawal of the rejection of Claims 19-21, as being unpatentable over Weiteder et al in view of Lawson is respectfully requested.

Reconsideration of the application and allowance of Claims 1-5 and 19-21 are respectfully requested.

Respectfully submitted,

PITTS & BRITTIAN, P.C.

A handwritten signature in dark ink, appearing to read "Paul E. Hodges". The signature is fluid and cursive, with the first name "Paul" and last name "Hodges" clearly distinguishable.

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